Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1971

In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICIA M. MOUSSEAU, PETITIONER

v.

DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

HPP

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1971

PATRICIA M. MOUSSEAU, PETITIONER

v.

DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a civilian employee of the Department of the Army, contends that the Merit Systems Protection Board (MSPB) improperly reviewed the Army's denial of her within-grade pay increase under the substantial evidence standard rather than the preponderance of the evidence standard.

1. Petitioner has been a civilian employee of the Army since 1977 and, at the time this action arose, was a GS-6 protocol assistant (Pet. App. A2). In March 1984 the Army formally notified petitioner that it intended to withhold the within-grade pay increase from step 4 to step 5 otherwise due to her (Pet. 6-7). The Army based its decision upon petitioner's failure "to perform three critical * * * elements [of her position] at an acceptable level of competence" (Pet. App. C2).

Petitioner sought and was granted a hearing before the MSPB. The MSPB presiding official ruled that the Army was required to prove by substantial evidence that it properly denied petitioner's within-grade pay increase and that the Army had carried its burden (Pet. App. C23). Petitioner sought review of the presiding official's ruling. The petition for review, which did not question the presiding official's use of the substantial evidence standard, was denied (Pet. App. B1-B5).

The court of appeals affirmed (Pet. App. A1-A7). The court rejected petitioner's claim that the preponderance of the evidence standard is the correct standard for review by the Board of an agency's decision to withhold an employee's scheduled within-grade pay increase. The court of appeals stated (Pet. App. A6) that petitioner's argument had been considered and expressly rejected by its predecessor, the Court of Claims, in *Meyer* v. *Department of Health & Human Services*, 666 F.2d 540 (1981). In *Meyer*, the Court of Claims held that the appropriate standard for review by the Board of an agency's decision to withhold an employee's scheduled within-grade pay increase is whether the agency's decision is supported by substantial evidence. The court of appeals declared that, pursuant to its decision in *South Corp.* v. *United States*, 690 F.2d 1368, 1370-1371 (Fed. Cir. 1982) (en banc), it was bound by the decision in *Meyer* and could not alter it absent reconsideration en banc (Pet. App. A6). The court added that petitioner's argument is identical to one recently rejected by the court in *Romane* v. *Defense Contract Audit Agency*, 760 F.2d 1286 (Fed. Cir. 1985) (Pet. App. A7). In that case, the court of appeals declined a suggestion to reconsider *Meyer* en banc, noting that no member of the panel and no judge on the court had requested a polling on a hearing en banc (*ibid.*).

2. For the reasons set forth in our opposition to the petition for a writ of certiorari in *Marques* v. *Department of Health & Human Services*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), cert. denied, No. 85-1463 (May 27, 1986)—where the petitioner also contended that denials of within-grade pay increases should be evaluated under the preponderance of the evidence standard—petitioner's claim that the MSPB improperly reviewed the Army's denial of her within-grade pay increase under the substantial evidence standard is without merit.[1] In addition, as we noted in our opposition in *Marques*, the Federal Circuit now has exclusive jurisdiction over appeals from MSPB decisions in such cases (see 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9)), so the conflict in the circuits to which petitioner refers (Pet. 14) is of no continuing importance. Indeed, the interpretation of the MSPB's enabling statute is a matter within the Federal Circuit's special competence, and that court was created because of the need for a forum "short of the Supreme Court" to provide uniform answers to matters within the court's special competence (S. Rep. 97-275, 97th Cong., 1st Sess. 3 (1981)). Accordingly, the question presented does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1986

---

[1]We have sent a copy of our brief in opposition to the petition for a writ of certiorari in *Marques* to counsel for petitioner.